

EDITOR'S NOTE

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85-1378-ATX
tus: GRANTED

Title: United States Senate, Appellant
v.
Mike Synar, Member of Congress, et al.

cketed:
bruary 18, 1986

Court: United States District Court
for the District of Columbia

e:
85-1377
85-1379
also:

Counsel for appellant: Davidson, Michael

Counsel for appellee: Morrison, Alan B.

ry	Date	Note	Proceedings and Orders
	Feb 18 1986	G	Statement as to jurisdiction filed.
	Feb 18 1986	G	Motion of the parties to dispense temporarily with printing and to set an expedited briefing schedule and argument date filed.
	Feb 18 1986		DISTRIBUTE. February 21, 1986
	Feb 19 1986	X	Memorandum of appellee National Treasury Employees Union filed. VIDE.
	Feb 19 1986	X	Memorandum of appellees Mike Synar, Member of Congress, et al. in response filed. VIDE.
	Feb 19 1986	X	Memorandum of appellee United States filed. VIDE.
	Feb 24 1986		Motion of the parties to dispense temporarily with printing and to set an expedited briefing schedule and argument date GRANTED.
	Feb 24 1986		PROBABLE JURISDICTION NOTED. The case is consolidated with 85-137 and 85-1379, and a total of one hour is allotted for oral argument. *****
	Mar 12 1986		Joint appendix filed. VIDE.
	Mar 14 1986		SET FOR ARGUMENT, Wednesday, April 23, 1986. (1st case)
	Mar 17 1986		Five lodgings, 10 copies, received.
	Mar 14 1986	G	Motion of National Treasury Employees Union for leave to add an individual party plaintiff filed.
	Mar 19 1986		Brief of appellant U.S. Senate filed. VIDE.
	Mar 19 1986		Brief amicus curiae of National Tax Limitation Committee, et al. filed. VIDE.
	Mar 19 1986		Brief amicus curiae of Howard H. Baker, Jr. filed. VIDE.
	Mar 19 1986		Brief of appellant Bowsher, Comptroller Gen. filed. VIDE.
	Mar 19 1986		Brief of appellant O'Neill, Speaker of U.S. filed. VIDE.
	Mar 24 1986		CIRCULATED.
	Mar 24 1986		DISTRIBUTE. March 28, 1986. (Motion of Natl. Treasury employees union for leave to add indiv. party plaintiff).
	Mar 27 1986	G	Motion of the parties for divided argument filed.
	Mar 31 1986		Motion of National Treasury Employees Union for leave to add an individual party plaintiff GRANTED.
	Mar 28 1986		Record filed.
	Mar 28 1986		Record filed.
	Mar 25 1986		Application of the S. G. for leave to file brief on the merits in excess of page limitation filed, and order granting same by Burger, CJ., on March 26, 1986. Not to
	Mar 25 1986		

y	Date	Note	Proceedings and Orders
			exceed 60 pages.
Apr	7 1986		Motion of the parties for divided argument GRANTED.
Apr	9 1986		Brief amicus curiae of Coalition for Health Funding, et al. filed. VIDE.
Apr	9 1986	X	Brief of appellees Synar, Member of Congress, et al. filed. VIDE.
Apr	9 1986	X	Brief of appellee National Treasury Employees Union filed. VIDE.
Apr	9 1986	X	Brief amicus curiae of Natl. Federation of Federal Employees filed. VIDE.
Apr	9 1986	X	Brief amicus curiae of William H. Gray, III filed. VIDE.
Apr	9 1986	X	Brief of appellee United States filed. VIDE.
Apr	9 1986	X	Brief amicus curiae of AFL-CIO, et al. filed. VIDE.
Apr	11 1986	G	Motion of Edward Blankstein for leave to file a brief as amicus curiae, out-of-time, filed.
Apr	14 1986	G	Motion of American Jewish Congress for leave to file a brief as amicus curiae, out-of-time, filed.
Apr	16 1986	X	Reply brief of appellant United States filed. VIDE.
Apr	16 1986	X	Reply brief of appellant Charles Bowsher, Comptroller filed. VIDE.
Apr	16 1986	X	Reply brief of appellants Speaker and Bipartisan Leadership Group of the House filed. VIDE.
Apr	16 1986	X	Reply brief of appellant U.S. Senate filed. VIDE.
Apr	21 1986		Motion of Edward Blankstein for leave to file a brief as amicus curiae, out-of-time, GRANTED.
Apr	21 1986		Motion of American Jewish Congress for leave to file a brief as amicus curiae, out-of-time, GRANTED.
Apr	16 1986		Application of the Comptroller General of the U.S. for leave to file a reply brief in excess of the page limitation filed (A-784), and order granting same by Burger, CJ, on April 17, 1986. The brief may not exceed 25 pages.
Apr	16 1986		Record filed.
Mar	28 1986		ARGUED.
Apr	23 1986		

FEB 18 1986

JOSEPH P. SPANIOLO, JR.
CLERK

No. 85-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether it violates the principle of separation of powers for the Comptroller General, an independent officer of the United States appointed by the President for a statutory term of years by and with the advice and consent of the Senate, to perform the administrative tasks assigned to him by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, because a provision (now 31 U.S.C. 703(e)) of the Budget and Accounting Act of 1921 establishes a procedure for his removal for cause by an enactment in conformity with the Presentation Clause, particularly when that provision has never been used or tested and could be severed if necessary.

PARTIES IN THE DISTRICT COURT

Pursuant to Rule 10.6 of this Court, this jurisdictional statement requests that the Court note probable jurisdiction over the identical question presented in two cases which were consolidated by the district court.

The plaintiffs in Civil Action No. 85-3945, in addition to Representative Mike Synar, are Representatives Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Traflicant, Jr. The plaintiff in Civil Action No. 85-4106 is the National Treasury Employees Union.

The United States is the defendant, and the Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General are intervenors, in both actions. The individual House intervenors are Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-

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v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is not yet reported and is set forth in the Appendix to Jurisdictional Statement ("App."), at 1a-52a, that is being filed by the appellant in the related case of Charles G. Bowsher, Comptroller General of the United States v. Mike Synar, Member of Congress, et al.

JURISDICTION

The jurisdiction of the district court was based on section 274(a)(1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or the "Act"), Pub. L. No. 99-177, and the consolidated cases below were heard and determined by a three-judge court pursuant to section 274(a)(5) of the Act, App. 116a. The district court entered its final order on February 7, 1986, App. 51a, and the

Senate filed identical notices of appeal later that day in each of the consolidated cases. The Senate's notice of appeal is appended to this jurisdictional statement.

This Court has jurisdiction under 28 U.S.C. 1252 because the order of the district court holds that provisions of an Act of Congress are unconstitutional. The jurisdiction of this Court is also founded on section 274(b) of the Act, App. 116a-117a, which provides in part: "Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this appeal are the Appointments Clause, Article II, section 2, clause 2, of the Constitution, App. 131a, sections 302 and 303 of the Budget and Accounting Act of 1921, App. 123a-124a, now 31 U.S.C. 703, App. 128a-129a, and the provisions of the Deficit Control Act, App. 56a-119a.

STATEMENT

The Deficit Control Act, which was signed into law by the President on December 12, 1985, provides for a phased reduction in the annual federal deficit to zero in fiscal year 1991. For the present fiscal year, 1986, and for the next fiscal year, 1987, which begins on October 1, 1986, the maximum deficit amounts are fixed at \$171.9 and \$144 billion respectively. Act, § 201(a)(7); App. 57a. Parts A and B of the Act, App. 57a-81a, extensively amend the Congressional Budget Act of 1974 to enhance the ability of the Congress and the President to meet these and succeeding deficit limita-

tions in the course of enacting annual appropriations. Part C of the Act, App. 81a-111a, which is the subject of these appeals, enacts, in accordance with the title of that part, "Emergency Powers to Eliminate Deficits in Excess of Maximum Deficit Amount."

Under these standby emergency powers, the Comptroller General receives a report from the Directors of the Office of Management and Budget and of the Congressional Budget Office, and then issues a report to the President on August 25 of this year and for the following five years. Act, § 251(b); App. 86a. In this report the Comptroller General estimates the amount by which federal outlays will exceed federal revenues in the coming fiscal year and the amount by which that deficit will exceed the maximum established by the Act. Then, after applying detailed rules for automatic spending increases, and for exemptions and limitations applicable to particular accounts, the Comptroller General equally divides the required reductions between the remaining defense and non-defense accounts and calculates the uniform percentage by which those accounts shall be reduced to avoid exceeding the maximum deficit. On September 1 the President is to issue an order sequestering funds based on the report of the Comptroller General. Act, § 252(a); App. 90a. The order is to become effective on October 1 but is to be modified on October 15 to take into account any expenditure and revenue legislation enacted by the Congress during the month of September to reduce or to eliminate the excess deficit. Act, § 252(b); App. 94a-95a.

For fiscal year 1986, the Act provides that the President's sequestration order shall be issued on February 1 and shall be effective March 1. Act, § 252(a)(1), (6)(A);

App. 90a, 93a. The Act includes a number of other special provisions for fiscal year 1986, including a limitation of the maximum sequestration to \$11.7 billion, a reduction which is required only if the estimated deficit as of January 10, 1986 reached or exceeded \$191.7 billion. Act, § 251(a)(3)(A)(ii); App. 82a.

On the day the President signed the Act, Representative Synar brought an action for a declaratory judgment that the Act unconstitutionally delegates the appropriation power of the Congress. Eleven other members of the House of Representatives joined him as plaintiffs. In a second action, the National Treasury Employees Union presented a similar challenge to the Act on behalf of their members who are retired federal employees and whose pension cost of living adjustments are subject to sequestration. The plaintiffs in both actions, which were consolidated by the district court, also claimed that the Act violates the separation of powers by vesting executive power in the Comptroller General, who the plaintiffs contend is an official of the legislative branch. The plaintiffs additionally alleged that the role of the Director of the Congressional Budget Office in reporting to the Comptroller General violates the separation of powers.

The United States, the nominal defendant, moved to invalidate the automatic deficit reduction provisions of the Act because the Act assigns authority to the Comptroller General. The United States also moved to dismiss Representative Synar's complaint for lack of standing. The Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General intervened to defend the Act. The district court ordered expedited briefing and heard argument on January 10, 1986.

In accordance with the Act the Directors of the Office of Management and Budget and of the Congressional Budget Office reported to the Comptroller General on January 15, 51 Fed. Reg. 1919 (1986), the Comptroller General reported to the President on January 21, 51 Fed. Reg. 2813 (1986), and the President issued the fiscal year 1986 sequestration order on February 1, 132 Cong. Rec. S847 (daily ed. Feb. 3, 1986). In their report the Office of Management and Budget estimated that the deficit for the current fiscal year will be \$220.1 billion, and the Congressional Budget Office estimated that the deficit will be \$220.9 billion. 51 Fed. Reg. 1923 (1986). The Comptroller General examined those estimates and concluded that "[n]o alternative assumptions which we might adopt would result in a deficit of less than \$191.9 billion, and any deficit exceeding this amount requires sequestering the maximum amount of \$11.7 billion for fiscal year 1986." 51 Fed. Reg. 2814 (1986). Consequently, the Comptroller General's report, and the presidential sequestration order, provide for the maximum \$11.7 billion reduction in federal outlays during the present fiscal year. The Act provides that the President may accompany a sequestration order with a message to the Congress proposing alternative ways to reduce the deficit, Act, § 252(c), App. 95a, but the President did not recommend to the Congress alternatives to the February 1 sequestration order, 132 Cong. Rec. S847 (daily ed. Feb. 3, 1986).

On February 7, the three-judge district court issued its opinion and order. After holding that the plaintiffs in each of the consolidated actions have standing, App. at 7a-13a, the district court rejected the plaintiffs' contention that the Act unconstitutionally delegates the appropriation power of the Congress. The court stated that "[t]hrough specification of

maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." Id. at 28a. The district court also found "unconvincing," id. at 28a n.18, the plaintiffs' claim that the involvement of the Congressional Budget Office in preparing a report for the Comptroller General violates the separation of powers. In dismissing that contention, the district court apparently agreed with the United States and the intervenors that the role of the Congressional Budget Office under the Act is only advisory.

The district court based its invalidation of the automatic deficit reduction provision of the Act solely on a never-used statutory provision that states that the Comptroller General, who is appointed to a fixed term of service by the President by and with the advice and consent of the Senate, may be removed for cause by a joint resolution of the Congress. This joint resolution of removal could be enacted only after notice and hearing and would require presentation to the President. Budget and Accounting Act of 1921, § 303, Pub. L. No. 67-13, ch. 18, 42 Stat. 20, 24 (now codified at 31 U.S.C. 703(e)).

The district court overrode appellants' contention that sound principles of judicial restraint counsel against presently adjudicating the constitutional impact of the unused removal provision. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 61 (1982) (plurality opinion), this Court referred to the authority of the judicial councils to remove bankruptcy judges in its enumeration of the ways in which bankruptcy judges lacked the